

# “Waters of the United States” Under the Clean Water Act

Virtual WQS Academy

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# Presentation Outline

- Background and History of “Waters of the United States”
- Current Implementation of “Waters of the United States”
- Questions and Answers



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# Background and History of “Waters of the United States”



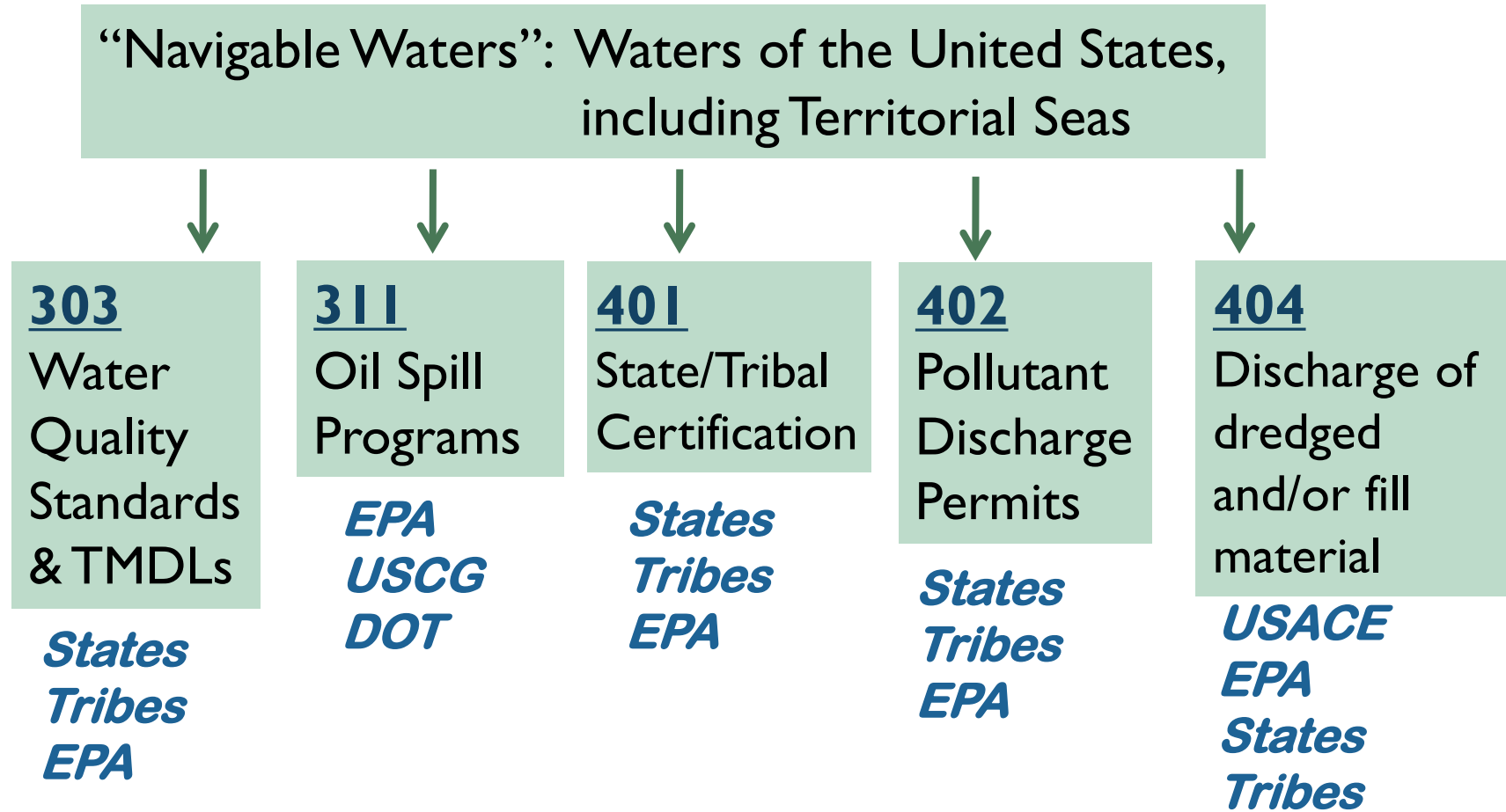
# Background: “Waters of the United States” and the Clean Water Act

- “Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.
- Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.”
- The Clean Water Act does not define “waters of the United States.”
- EPA and the Department of the Army have defined “waters of the United States” by regulation since the 1970s.



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# Background: Why ‘Waters of the United States’ Matters

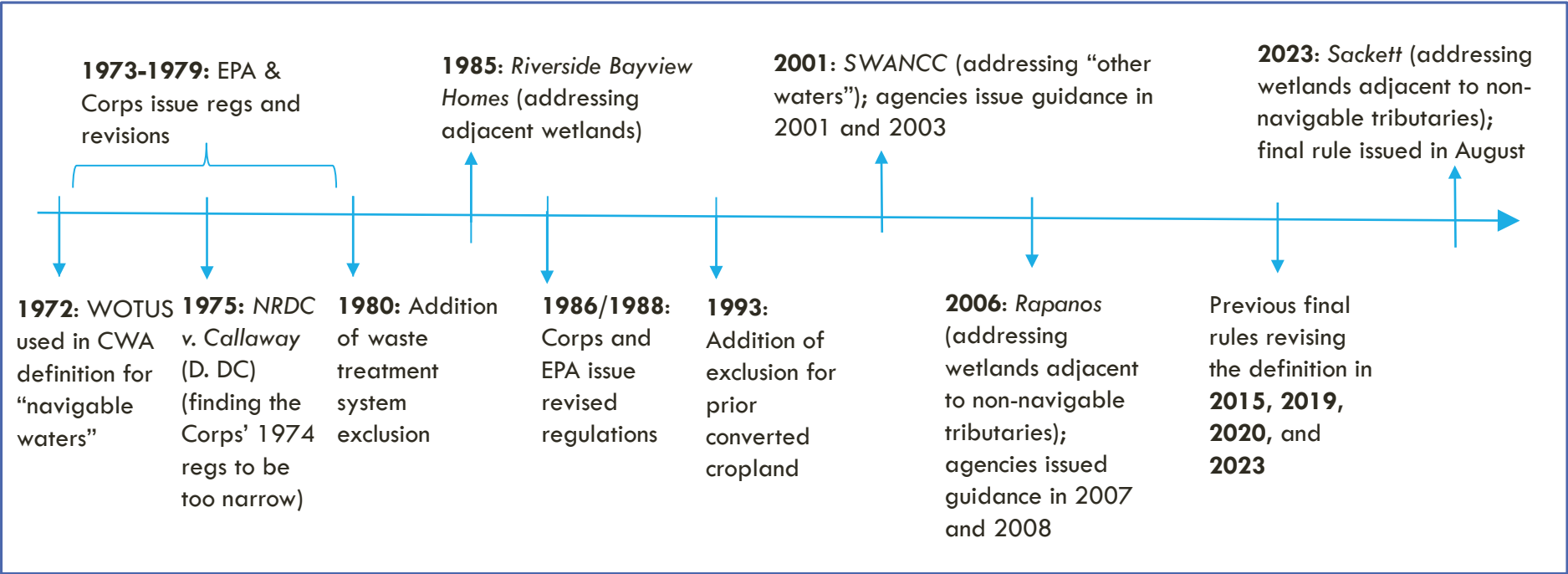


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# Background: “Waters of the United States” Over Time

The definition of “waters of the United States” has been a subject of dispute and addressed in several major Supreme Court cases.



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# Categories of Potential “Waters of the United States” and Exclusions



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# “Waters of the United States” Over Time

## **EPA Regulations: 1973 Definition of “Navigable Waters”**

- EPA issued regulations defining “navigable waters” to include Rivers and Harbors Act of 1899 (RHA) Section 10 waters and their tributaries, interstate waters, and intrastate lakes, rivers, and streams which meet certain interstate commerce criteria.

## **Corps Regulations: 1974 Definition of “Navigable Waters”**

- The Corps issued regulations defining “navigable waters” as limited to the Section 10 waters it had regulated under the RHA.

## ***Natural Resources Defense Council v. Callaway (D.D.C. 1975)***

- Ordered the revocation and rescission of the Corps’ definition, saying that Congress intended “the waters of the United States...” to extend to the maximum extent permissible under the Commerce Clause of the Constitution.

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# “Waters of the United States” Over Time

## Regulations: Corps 1975 Definition of Navigable Waters (Finalized 1977)

- The regulations extended beyond traditional navigable waters, to include nonnavigable tributaries, their adjacent wetlands, lakes, “isolated” or “intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters” that “necessitate regulation for the protection of water quality.”

## Congressional Response to 1977 Regulations and CWA § 404(g)

- In response to the Corps’ broadened reading of CWA jurisdiction, the House passed a bill to limit the definition of “waters of the US” to traditional navigable waters, but the Senate rejected the House bill.
- Instead, Congress adopted the following amendments:
  - CWA § 404(e), which authorized the use of “general permits” to streamline the permitting process;
  - CWA § 404(f), which among other activities, exempts “normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating...”; and
  - CWA § 404(g) to allow states to administer a permit program for the discharge of dredged or fill material.

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# “Waters of the United States” Over Time: *Riverside Bayview*

## Supreme Court decision in *U.S. v. Riverside Bayview Homes* (1985)

- The Court unanimously upheld the Corps’ inclusion of “adjacent wetlands” in the regulatory definition of “waters of the United States.”

**No guidance issued**



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# “Waters of the United States” Over Time: the Pre-2015 Regulations

## Categories of Jurisdictional Waters\*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands

## Categories of Non-Jurisdictional Waters\*

Waste treatment systems and prior converted cropland

**\*NOTE:** For efficiency, this slide’s list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. *See, e.g.*, 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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# “Waters of the United States” Over Time: *SWANCC*

Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (2001)

- The Court held, in a 5-4 decision, that the CWA does not confer jurisdiction over isolated waters solely on the basis that they provide habitat for migratory birds.

**Guidance issued in 2001, revised 2003**



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# “Waters of the United States” Over Time: *Rapanos*

- **Supreme Court decision in *Rapanos v. U.S.* (2006)**

- The Justices were divided in a 4-1-4 opinion on the question of CWA jurisdiction over wetlands adjacent to nonnavigable tributaries of traditional navigable waters.

- **Scalia Plurality Opinion**

Considered “waters of the United States” to include:

- “relatively permanent, standing or continuously flowing bodies of water forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and
- Wetlands that have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”

- **Kennedy Concurring Opinion**

Considered “waters of the United States” to include:

- “a water or wetland must possess a ‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”

- **Dissent**

- deferred to the Corps’ assertion of jurisdiction and concluded that the term “waters of the United States” encompasses all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.”

- **Guidance issued in 2007, revised 2008**

- **Circuit Court Decisions:** All eight circuit courts to address the issue held that jurisdiction was proper at least under the Kennedy standard; none held that the plurality was the sole basis that may be used to establish jurisdiction.

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# “Waters of the United States” Over Time: 2015 Clean Water Rule and 2019 Repeal Rule

## 2015 Clean Water Rule

- 6 categories of waters jurisdictional by rule
- 2 categories that required significant nexus analysis: similarly situated regional waters (a)(7) and case-specific significant nexus waters (a)(8)
- 7 exclusions
- Key concepts: plurality standard; significant nexus

## 2019 “Repeal Rule”

- Repealed the 2015 Rule and restored the pre-2015 Rule regulations pending a revised definition of “waters of the United States”
- Implemented consistent with applicable guidance

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# “Waters of the United States” Over Time: 2020 Navigable Waters Protection Rule

## 2020 Navigable Waters Protection Rule

- 4 categories of waters jurisdictional by rule
  - Traditional Navigable Waters and the Territorial Seas
  - Tributaries
  - Lakes and Ponds and Impoundments
  - Adjacent Wetlands
- 12 exclusions
- Key concepts: “typical year”; ephemeral exclusions

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# “Waters of the United States” Over Time: 2020 Navigable Waters Protection Rule

- As a result of the agencies’ review of the 2020 Navigable Waters Protection Rule (NWPR) under Executive Order 13990, EPA and the Army asked courts to remand the rule to the agencies for reconsideration, without vacatur, and to dismiss the accompanying litigation.
  - *Pascua Yaqui Tribe v. EPA* (D. Ariz.) – remanded and vacated on August 30, 2021.
  - *Navajo Nation v. Regan* (D.N.M.) – remanded and vacated on September 27, 2021.
- In light of the August 30 vacatur order, the agencies halted implementation of the 2020 NWPR and implemented the definition of “waters of the United States” consistent with pre-2015 practice nationwide.

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# “Waters of the United States” Over Time: January 2023 Rule

## January 2023 Rule: Revised Definition of “Waters of the United States”

- 5 categories of jurisdictional waters
  - Traditional Navigable Waters, the Territorial Seas, and Interstate Waters
  - Impoundments
  - Tributaries
  - Adjacent Wetlands
  - Additional Waters (that do not meet another jurisdictional category)
- 8 exclusions
- Key concepts: relatively permanent standard; significant nexus standard

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# Current Implementation of “Waters of the United States”

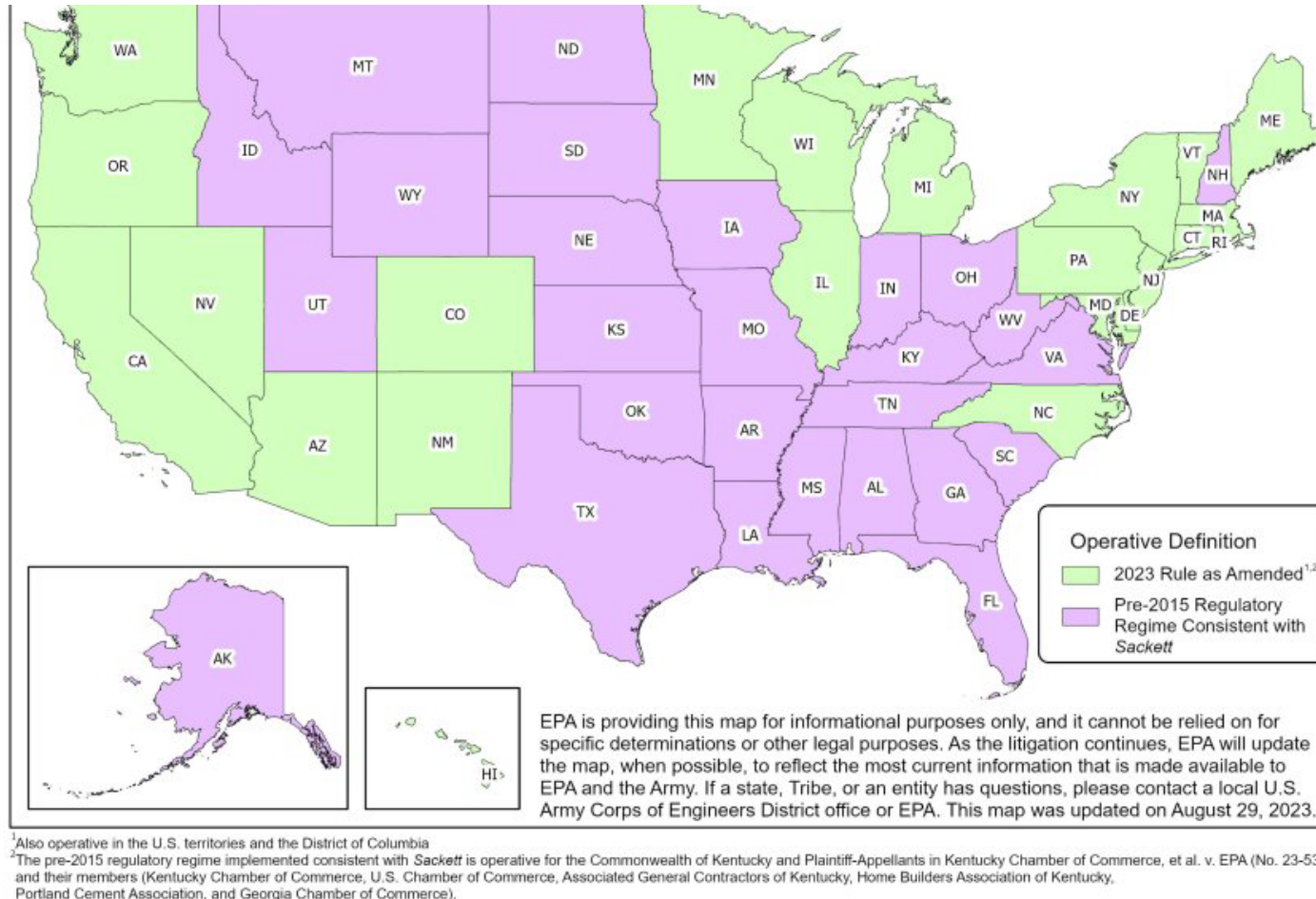


# Background: Recent Events

<b>January 2023</b>	2023 Rule published – “Revised Definition of ‘Waters of the United States’”
<b>March 2023</b>	2023 Rule effective; operative in certain States
<b>May 2023</b>	<i>Sackett</i> Supreme Court decision
<b>June 2023</b>	EPA and Army announce plans to issue a final rule amending the 2023 rule
<b>August 2023</b>	Final rule amending the 2023 rule: signature and announcement
<b>September 2023</b>	Final rule amending the 2023 rule: publication and effective date

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# Background: Operative Definition of “Waters of the United States”



<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>

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# Background: *Sackett* Decision

- While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in the rule.
- The Court concluded that the significant nexus standard was inconsistent with the Court's interpretation of the Clean Water Act (CWA).
- The Court concluded that the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.
- The Court also agreed with the *Rapanos* plurality that adjacent wetlands are "waters of the United States" when the wetlands have a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands.

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# Background: Conforming Rule Amending January 2023 Rule

- September 8, 2023: EPA and Army Corps published a rule to amend the January 2023 definition of “waters of the United States” to conform with *Sackett*; rule was effective upon publication.
- In the conforming rule, the agencies determined that there is good cause under the Administrative Procedure Act to issue a final rule because certain provisions of the January 2023 Rule were invalid under the Supreme Court’s interpretation of the Clean Water Act in *Sackett*.
- Targeted changes to January 2023 Rule categories of “waters of the United States”:
  - (a)(1):
    - (i) Traditional navigable waters
    - (ii) Territorial Seas
    - (iii) Interstate Waters – revised to remove interstate wetlands
  - (a)(2) Impoundments of Jurisdictional Waters
  - (a)(3) Tributaries – revised to delete significant nexus standard
  - (a)(4) Adjacent Wetlands – revised to delete significant nexus standard
  - (a)(5) Additional Waters – revised to delete significant nexus standard and delete streams and wetlands
- Targeted changes to January 2023 Rule Definitions:
  - (c)(2) Adjacent – revised to mean “having a continuous surface connection”
  - (c)(6) Significantly affect – deleted
- No changes to January 2023 Rule Exclusions

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# Amended 2023 Rule: Framework

## Categories of Jurisdictional Waters

(a)(1)

- (i) Traditional Navigable Waters
- (ii) Territorial Seas
- (iii) Interstate Waters

(a)(2) Impoundments of Jurisdictional Waters

(a)(3) Tributaries

(a)(4) Adjacent Wetlands

(a)(5) Intrastate lakes and ponds that do not fall within (a)(1) – (a)(4)



**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional waters are shorthand for the jurisdictional categories in the regulations. See 33 CFR 328.3(a) and 40 CFR 120.2(a).

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# Amended 2023 Rule: Framework

## Exclusions\*

(b)(1) Waste treatment systems

(b)(2) Prior converted cropland

(b)(3) Certain ditches

(b)(4) Artificially irrigated areas that would revert to dry land if irrigation ceased

(b)(5) Certain artificial lakes and ponds

(b)(6) Artificial reflection or swimming pools or other small ornamental bodies of water

(b)(7) Certain waterfilled depressions

(b)(8) Swales and erosional features

(b)(1) – (b)(2):

Pre-2015 exclusions, modified in the regulations

(b)(3) – (b)(8):

Pre-2015 “generally non-jurisdictional features,” added to the regulations as exclusions

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# Amended 2023 Rule: Framework

## Definitions

(c)(1) Wetlands

(c)(2) Adjacent

(c)(3) High tide line

(c)(4) Ordinary high water mark

(c)(5) Tidal waters



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Traditional Navigable Waters**
  - Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
  - EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **The Territorial Seas**
  - Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Amended 2023 Rule: (a)(1) Waters – Traditional Navigable Waters, the Territorial Seas, and Interstate Waters

- **Interstate Waters**
  - “Waters of the United States” include interstate waters.
  - The conforming rule revised the January 2023 rule to remove “interstate wetlands” from the provision.
  - Lakes and ponds crossing state boundaries are jurisdictional as interstate waters in their entirety.
  - For rivers and streams, interstate waters include the portion of the river or stream that is of the same stream order as the point that crosses or serves as a state line.



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# Amended 2023 Rule: (a)(2) Impoundments

- “Waters of the United States” include impoundments of waters that otherwise meet the definition of “waters of the United States.”
- The agencies consider paragraph (a)(2) impoundments to include:
  - (1) Impoundments created by impounding one of the “waters of United States” that was jurisdictional under the Amended 2023 Rule’s definition at the time the impoundment was created, and
  - (2) Impoundments of waters that at the time of assessment meet the definition of “waters of the United States” under paragraph (a)(1), (a)(3), or (a)(4) of the Amended 2023 Rule, regardless of the water’s jurisdictional status at the time the impoundment was created.



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# Amended 2023 Rule: (a)(3) Tributaries

- Tributaries include natural, man-altered, or man-made water bodies that flow directly or indirectly into (a)(1) waters or (a)(2) impoundments.
  - Tributaries can include rivers, streams, lakes, ponds, and impoundments.
  - Tributaries can also include ditches and canals.
- Jurisdictional tributaries must meet the relatively permanent standard.



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# Amended 2023 Rule: (a)(3) Tributaries

## Relatively Permanent Standard

- Relatively permanent waters include tributaries that have flowing or standing water year-round or continuously during certain times of year.
- Relatively permanent waters do not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- **Adjacent** has been revised by the conforming rule to mean having a continuous surface connection.
- **Jurisdictional adjacent wetlands** include:
  - Wetlands that are adjacent to an (a)(1) water, relatively permanent jurisdictional impoundment, or relatively permanent tributary.



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# Amended 2023 Rule: (a)(4) Adjacent Wetlands

## Continuous Surface Connection

- A **continuous surface connection** means the wetlands either physically abut or touch the paragraph (a)(1) or relatively permanent water, or are connected to the paragraph (a)(1) or relatively permanent water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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# Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

- Jurisdictional (a)(5) waters include intrastate lakes and ponds not identified in the other jurisdictional categories, that meet the relatively permanent standard.
- The conforming rule revised the January 2023 rule to remove “streams” and “wetlands” from the (a)(5) provision.

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# Amended 2023 Rule: (a)(5) Waters: lakes and ponds not identified in (a)(1) – (a)(4)

## Relatively Permanent Standard

- Lakes and ponds assessed under paragraph (a)(5) meet the relatively permanent standard if they are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a paragraph (a)(1) water or tributary that is relatively permanent.
- The agencies will assess lakes and ponds under paragraph (a)(5) to determine if they are **relatively permanent** using a similar approach to the one described for tributaries.
- The agencies will assess a **continuous surface connection** between lakes and ponds assessed under paragraph (a)(5) and a paragraph (a)(1) water or a tributary that is relatively permanent using the approach described for wetlands.

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# Amended 2023 Rule: Exclusions

- Excluded waters or features are not jurisdictional as “waters of the United States.”
- Exclusions do not apply to paragraph (a)(1) waters.
- The regulations include the pre-2015 regulatory exclusions:
  - Waste treatment exclusion, prior converted cropland exclusion
- The regulations contain exclusions for features that were “generally non-jurisdictional” under the pre-2015 regulatory regime:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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# Pre-2015 Regulatory Regime: Terminology

The “**pre-2015 regulatory regime**” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience.

<https://www.epa.gov/wotus/pre-2015-regulatory-regime>

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# Pre-2015 Regulatory Regime: Framework

## Categories of Jurisdictional Waters\*

- (a)(1) Traditional Navigable Waters
- (a)(2) Interstate Waters
- (a)(3) Other Waters
- (a)(4) Impoundments
- (a)(5) Tributaries
- (a)(6) The Territorial Seas
- (a)(7) Adjacent Wetlands



## Categories of Non-Jurisdictional Waters\*

Waste treatment systems and prior converted cropland

**\*NOTE:** For efficiency, this slide's list of the categories of jurisdictional and non-jurisdictional waters are shorthand for the categories in the regulations. See, e.g., 33 CFR 328.3 (2014) and 40 CFR 230.3(s) (2014).

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# Pre-2015 Regulatory Regime:

## (a)(1) – Traditional Navigable Waters

- Waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as “Traditional Navigable Waters” Under Section (a)(1) of the Agencies’ Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.



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# Pre-2015 Regulatory Regime:

## (a)(2) – Interstate Waters

- “Waters of the United States” include interstate waters.
- These are waters that cross or act as State boundaries.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will not assert jurisdiction over interstate wetlands solely because they are interstate.



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# Pre-2015 Regulatory Regime:

## (a)(3) – Other Waters

Paragraph (a)(3) of the pre-2015 regulations:

- All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
  - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
  - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
  - (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;”

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# Pre-2015 Regulatory Regime:

## (a)(3) – Other Waters

- Under the pre-2015 regulatory regime, consistent with *Sackett*, the agencies will limit the scope of the (a)(3) provision to assessing only relatively permanent lakes and ponds that do not meet one of the other jurisdictional categories.
- The agencies have not asserted jurisdiction over any (a)(3) other waters under the pre-2015 regulatory regime since the *SWANCC* decision was issued in 2001.

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# Pre-2015 Regulatory Regime:

## (a)(4) – Impoundments

- “Waters of the United States” include impoundments of waters otherwise identified as “waters of the United States.”
- Under the pre-2015 regulatory regime:
  - Impoundment of “waters of the United States” as a general matter does not affect the water’s jurisdictional status.
  - Documentation should 1) demonstrate that the impoundment was created from “waters of the United States,” 2) demonstrate that the water meets the criteria for another jurisdictional category, or 3) assess the impoundment under paragraph (a)(3).



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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

- The regulatory text of this category includes tributaries of waters identified in paragraphs (a)(1) through (a)(4).
  - Under the pre-2015 regulatory regime, a tributary includes natural, man-altered, or man-made water bodies that flow directly or indirectly into a traditional navigable water (TNW).
  - Tributaries also include such water bodies that flow directly or indirectly into an interstate water, even when there is no connection to a TNW.
- Tributaries can include rivers, streams, lakes, ponds, and impoundments.
- Tributaries can also include ditches and canals.
- Jurisdictional tributaries must be relatively permanent.



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# Pre-2015 Regulatory Regime:

## (a)(5) – Tributaries

### Relatively Permanent

- Relatively permanent waters include tributaries that typically have flowing or standing water year-round or continuously at least seasonally (e.g., typically three months).
  - The duration of seasonal flowing or standing water may vary regionally, but the tributary must have predictable flowing or standing water seasonally.
- Non-relatively permanent tributaries are those that have flowing or standing water only in response to precipitation or that do not have continuously flowing or standing water at least seasonally.



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# Pre-2015 Regulatory Regime:

## (a)(6) – the Territorial Seas

- Defined in section 502(8) of the Clean Water Act as “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.”



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

- **Wetlands** means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- Under the pre-2015 regulatory regime, consistent with *Sackett*, **adjacent** will be interpreted to mean “having a continuous surface connection.”
- Jurisdictional adjacent wetlands include:
  - Wetlands that have a continuous surface connection to a traditional navigable water, interstate water, the territorial seas, or a relatively permanent tributary or impoundment.



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# Pre-2015 Regulatory Regime:

## (a)(7) Adjacent Wetlands

### Continuous Surface Connection

- Wetlands have a continuous surface connection when they physically abut or touch a jurisdictional water.
- Abutting wetlands are those that “touch” a jurisdictional water (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent).
- Wetlands also have a continuous surface connection when they are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior EPA practice).
- Note that *Sackett* is clear that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”



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# Pre-2015 Regulatory Regime: Exclusions and Generally Non-Jurisdictional Features

- Regulatory exclusions include:
  - Waste treatment exclusion, prior converted cropland exclusion
- Features that are generally not jurisdictional per the 1986 preamble language and the 2008 *Rapanos* guidance include:
  - Certain ditches, certain artificially irrigated areas, certain artificial lakes and ponds, certain artificial reflecting and swimming pools, certain waterfilled depressions, certain swales and erosional features

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# Additional Resources: Implementation Memoranda

- EPA and Army have prepared new **Coordination Memos** to ensure consistency of jurisdictional determinations under the 2023 Rule, as amended, and the Pre-2015 Regulatory Regime.
- EPA, Army, and USDA will continue to implement the 2022 **Agricultural Memo** that clarifies the agencies' roles and programs, and in particular clarifies the prior converted cropland exclusion.
- EPA and Army will continue to use the legal memorandum **Waters That Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations** (formerly known as Appendix D) to provide guidance for identifying traditional navigable waters.
- EPA and Army are also retaining the **2020 Ditch Exemption Memo** clarifying implementation of the ditch exemption under Clean Water Act section 404(f).

<https://www.epa.gov/wotus>

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# Additional Resources: Policy Memoranda

**Memoranda for draft approved JDs completed under the 2023 Rule, as amended ([available on the web](#)).**

- [Memorandum on LRB-2021-01386](#) – This memorandum addresses the concept of how to identify the wetland area which is then assessed under the jurisdictional standard.
- [Memorandum on MVS-2023-00288](#) – This memorandum addresses the concept of how to identify tributary reaches for purposes of assessing tributaries.
- [Memorandum on NWP-2023-602](#) – This memorandum addresses whether the specific subsurface storm drain at issue can serve as a continuous surface connection for adjacent wetlands.

**Memoranda for draft approved JDs completed under the pre-2015 regulatory regime ([available on the web](#)).**

- [Memorandum on NWO-2003-60436](#) – This memorandum addresses the concept of how to identify the wetland area which is then assessed under the jurisdictional standard.
- [Memorandum on LRL-2023-00466](#) – This memorandum addresses the concept of when ponds are considered part of the tributary network.
- [Memorandum on SAS-2001-13740](#) – This memorandum addresses the concept of how to apply the waste treatment system exclusion.

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## Knowledge Check Question #1: Where is the Term “Waters of the United States” Defined?

- a) The Clean Water itself provides a robust definition of the term.
- b) The term is defined in EPA and Corps regulations.
- c) The term is defined by individual states and Tribes.
- d) There is no formal definition, but the public can access various guidance documents on the term.

## Knowledge Check Question #2: Why Does the Definition of “Waters of the United States” Matter?

Check all that apply

- a) It affects the extent to which CWA provides protection over waters
- b) It influences how states and authorized Tribes for certain CWA programs will implement those programs
- c) It may influence how states and Tribes strategize for protecting their resources into the future—such as whether to pursue authorization for additional CWA programs
- d) It influences how EPA or the Army will directly implement CWA programs on state or Tribal lands in the absence of an authorized state or Tribal program

## Knowledge Check Question #3: True or False?

If aquatic resources are not "waters of the United States," the Clean Water Act prohibits states and Tribes from applying water quality protections to those resources under independent authorities.



# THANK YOU!

EPA website:

<https://www.epa.gov/wotus>

Corps website:

[https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris\\_info/](https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/juris_info/)

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